ZARA AIDA RAZALI & ORS v. SUNGEI LALANG DEVELOPMENT SDN BHD

HIGH COURT MALAYA, SHAH ALAM
SM KOMATHY J
[CIVIL SUIT NO: BA-22NCVC-9-01-2018]
14 AUGUST 2020

CONTRACT: *Agreement – Sale and purchase agreement – Vacant possession – Allegations of delay in delivery of vacant possession – Claim for liquidated ascertained damages ('LAD') – Purchasers entered into sale and purchase agreement with property developer for purchase of house – Developer issued notice of delivery of vacant possession without certification of fitness – Purchasers occupied premises and made renovations despite non-issuance of certificate of fitness – Whether there was delay in delivery of vacant possession – Whether delay caused by purchasers/developer – Whether notice of delivery of vacant possession valid – Whether purchasers entitled to claim for LAD having contravened building laws – Whether purchasers estopped from claiming for LAD – Uniform Building By-Laws 1984, s. 28 – Street, Drainage and Building Act 1974, s. 70*

Between 2010 and 2011, the plaintiffs entered into sale and purchase agreements ('SPA') with the defendant, a property developer, to purchase semi-detached houses ('units'). Clause 22 of the SPA provided that (i) vacant possession of the units shall be delivered to the purchaser in the manner prescribed in cl. 23 within 24 months of the date of the SPA; and (ii) if the defendant failed to deliver vacant possession, it shall be liable to pay the purchaser the liquidated ascertained damages ('LAD'). On 13 April 2012, the defendant's architect signed off the certificate of compliance and completion ('CCC'), confirming that the works for the project had been completed. However, there was no certification of fitness ('CF') by the architect, as required under cl. 23(2) of the SPA. On 18 June 2012, the defendant issued a notice informing the plaintiffs that they could collect the keys upon the payment of the final 20% progressive payments due under the SPA ('notice of delivery of vacant possession'). The notice of delivery of vacant possession, however, cautioned the plaintiffs that they could not occupy the premises as the CF had been yet to be issued by Majlis Perbandaran Sepang ('MPS'). The plaintiffs made their respective payments, collected their keys and, in spite of the above caution, proceeded to occupy and renovate their units. As a result, the defendant could not procure the CF from MPS and was required to amend and re-submit the building plans. MPS eventually issued the CF on 23 June 2014 and 15 January 2015. The plaintiffs commenced the present action against the defendant, claiming for LAD on the ground that the defendant had breached cls. 22(1) and 22(2) of the SPA. Objecting to the claim, the defendant submitted that (i) there was

A no delay in the delivery of vacant possession; (ii) the delivery of vacant possession for the project was by way of CF and not CCC; (iii) the phrase CCC in cl. 23 of the SPA had been mistakenly inserted *in lieu* of CF and, as such, the plaintiffs could not predicate their claim on the CCC; (iv) in law, the developer of a project governed by CF is required to deliver only B possession within 24 months; (v) it would be unconscionable to allow the plaintiffs to claim LAD as they were responsible for the delay in the issuance of the CF; (vi) the defendant had carried out the renovations without its knowledge and consent; and (vii) the plaintiffs had committed criminal offences by contravening the provisions of the Uniform Building By-Laws C 1984 ('By-Laws') and the Street, Drainage and Building Act 1974 ('Act') when they occupied and renovated the units prior to the issuance of the CF. The issues that arose for adjudication were (i) whether the notice of delivery of vacant possession issued by the defendant was valid; and (ii) whether the plaintiffs were entitled to the reliefs claimed on account of them having contravened the By-Laws and the Act.

D

Held (dismissing claim):

(1) The defendant was bound by the terms in the SPA. The SPAs were signed after the change in legislation pertaining to the CCC had come into force. There was nothing in this case to oust the application of the E well-known rule that parties are bound by the terms of the agreement they sign in the absence of fraud and misrepresentation. The date of approval by the authorities of the project had no relevance to whether it was the CF or the CCC that had application; it was the date of the SPAs which were made after the coming into force of the amendment F of the Housing Development (Control and Licensing) Act 1966 that was relevant. It would follow that the defendant's submission that vacant possession for the project was by way of CF was untenable. The notice of delivery of vacant possession was invalid. The defendant's obligation under cl. 23 was to deliver to the plaintiffs both possession and the right to occupy the units within 24 months. There was a delay in the delivery G of vacant possession. (paras 24 & 26)

(2) Based on s. 28 of the By-Laws, a purchaser who contravenes the said provision and occupies a house before the issuance of the CF for occupation attracts penal consequences. Furthermore, under s. 70 of the H Act, a purchaser who carries out renovations without the prior written permission of the local authority also commits a criminal offence. No one can take advantage of the existence of a state of things which he himself produced. It would be an affront to justice and public policy to allow a party in breach of its contractual obligations to rely on its very I breach to either evade its obligations or to assert that the other contracting party must accept the consequences of that breach. As a

matter of public policy, the court should not appear to reward or condone a breach of the law. The plaintiffs should not be allowed to take advantage of a condition which they themselves brought. They occupied and undertook renovations to their units, in breach of the express prohibition of law. LAD is awarded to a purchaser to compensate him for losses he would suffer when he is forced to look for alternative accommodation consequent upon delay in the delivery of vacant possession. However, the plaintiffs could not claim they have suffered losses. The principle that a party would not be allowed to take advantage of its own operates here to prevent the plaintiffs from claiming the LAD. The conduct of the plaintiffs created such estoppel. (paras 31, 33, 34, 36 & 37)

Case(s) referred to:
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Legislation referred to:
Specific Relief Act 1950, s. 30
Street, Drainage and Building Act 1974, s. 70
Uniform Building By-Laws 1984, s. 28

For the plaintiffs - Wan Muhammad Hafiz Wan Zawawi & Aimi Shazwani Yaakob; M/s Rafida Razak & Co
For the defendant - Teh Hock Leng; M/s HL Teh & Assocs

Reported by Najib Tamby

JUDGMENT

SM Komathy J:

The Trial

[1] This is the trial of an action brought by Zara Aida binti Razali and 26 others ("the plaintiffs") against Sungei Lalang Development Sdn Bhd ("the defendant"). The plaintiffs claim against the defendant is for liquidated and ascertained damages ("LAD") under the housing developers legislation for late delivery of vacant possession.

Background Facts

[2] Save where otherwise indicated, these facts were all agreed or not disputed.

[3] The plaintiffs are house buyers and the defendant, a licensed property developer. The plaintiffs entered into separate agreements ("SPAs") with the defendant on different dates between 2010 and 2011 to purchase semi-detached residential houses ("units") in a project developed by the defendant in Bangi and called Desa Camilla.

[4] Clause 22(1) of the SPAs stipulated that vacant possession of the units shall be delivered to the purchaser in the manner stipulated in cl. 23 within 24 months of the date of the SPA. Clause 23 was in these terms:

> Manner of delivery of vacant possession
>
> 23. (1) The vendor shall let the Purchaser into possession of the said property upon the following:
>
> (a) the issuance of a **certificate of completion and compliance** certifying that the said building has been duly constructed and completed in conformity with the approved plans and the requirements of the Street, Drainage and Building Act 1974 and any by-laws made thereunder;
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> (b) water and electricity supply are ready for connection to the said Building; and
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> (c) the Purchaser having paid all monies payable under sub-clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement.
>
> (2) The delivery of vacant possession by the Vendor shall be supported by a **certificate of completion and compliance** certifying that the said Building is safe and fit for occupation and includes the handing over the keys of the said Building to the Purchaser.
>
> (3) Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Property, whether or not the purchaser has actually entered into possession of the said Property, the Purchaser shall deemed to have taken delivery of vacant possession.
>
> (emphasis added)

[5] Clause 22(2) provided that if the defendant failed to deliver vacant possession, it shall be liable to pay the purchaser LAD calculated from day to day at the rate of 10% pa of the purchase price from the expiry of the date for the delivery of vacant possession until the date the purchaser takes vacant possession of the unit.

[6] On 13 April 2012, the defendant's architect, Ahmad Farik Abd Ghaffar, signed off the certificate of compliance and completion confirming that the works in respect of the project had been completed. It is apposite to note that there was no certification by the architect that the units were fit for occupation as required under cl. 23(2) of the SPAs. The material portions of the certificate read:

> Type : Semi detached House
>
> Units : Plot 0001 – 0016 (16 units)
>
> Plot 0017 – 0030 (14 units)

> We hereby certify that the said building has been duly constructed and completed in accordance with relevance Acts, by laws and regulations and that all conditions imposed by the Appropriate Authorities in respect of the issuance of the Certificate of Fitness for occupation have been duly complied.

[7] By notice dated 18 June 2012 ("notice of delivery of vacant possession"), the defendant informed the plaintiffs of the completion of the construction works and invited them to collect the keys upon on paying the final 20% progressive payments due under the agreement. The letter in so far as material reads:

> Mengikut Klausa (22), surat perjanjian Jual Beli yang ditandatangani diantara pihak Tuan/Puan dan kami, penyerahan kosong hanya boleh dibuat setelah semua bayaran berperingkat dikeluarkan oleh institusi pinjaman atau oleh pihak Tuan/Puan sendiri seperti di dalam Jadual 4(3) Surat Perjanjian Jual Beli dan lain-lain bayaran yang telah didahulukan oleh pihak kami seperti di lampiran (disertakan) dijelaskan terlebih dahulu oleh pihak Tuan/Puan.
>
> **Dimaklumkan juga bahawa ini hanyalah merupakan penyerahan kosong sahaja dan pihak Tuan/Puan tidak berhak untuk mendiami premis tersebut sehingga sijil layak menduduki dikeluarkan oleh pihak Majlis Perbandaran**.
>
> Sekiranya Tuan/Puan telah mematuhi syarat di atas, Tuan/Puan diminta hadir di pejabat kami untuk membuat bayaran yang tertunggak dan mengambil kunci dalam tempoh empat belas (14) hari dari tarikh surat ini.
>
> Kegagalan pihak Tuan/Puan menerima penyerahan kosong dalam tempoh yang diberi bermakna Tuan/Puan dianggap telah menerima penyerahan kosong tersebut.
>
> (emphasis added)

[8] The plaintiffs paid the monies and collected the keys. Despite para. 2 of the notice of the aforementioned notice, the plaintiffs proceeded to occupy and renovate their units without waiting for the issuance of the certificate of fitness. As a result, the defendant was unable to procure the certificate of fitness from Majlis Perbandaran Sepang, and was required by the latter to amend and resubmit the building plans. On 23 June 2014, the local authority issued the certificate of fitness in respect of the units purchased by first to third plaintiffs, and the remaining units, on 15 January 2015.

[9] The plaintiff's then sought LAD from the defendant for the delay in procuring the certificate of fitness. The defendant refused to accede. Whereupon, the plaintiffs instituted this action in January 2018 for a declaration that the defendant had breached cls. 22(1) and 22(2) of the agreement and sought LAD.

Case For The Plaintiffs

[10] It was the plaintiffs' case that the defendant was obliged under cl. 23 to deliver both possession and the right to occupy the units within 24 months. It was said that the defendant was in breach of this clause when it issued the notice of delivery of vacant possession dated 18 June 2012 (para. [7] (*supra*)) giving only possession but without the right to occupy the units. The defendant was therefore liable to pay the plaintiffs LAD until the date of issuance of the certificate of fitness.

[11] It was also the plaintiffs' case that they should not be precluded from seeking LAD because they had occupied and renovated their units without waiting for the issuance of the certificate of fitness. It was alleged that they had done so with the knowledge and consent of the defendant.

Case For The Defendant

[12] On the other hand, the defendant denied there was delay in the delivery of vacant possession. Its case was that delivery of vacant possession for the Desa Camilla project was by way of certificate of fitness and not certificate of compliance and completion. It was said that the phrase certificate of compliance and completion in cl. 23 of the agreements had been mistakenly inserted *in lieu* of certificate of fitness. As such, the plaintiffs cannot predicate their claim on the certificate of compliance and completion. In law, the developer of a project governed by certificate of fitness, is required to deliver only possession within 24 months.

[13] In the alternative, the defendant alleged that it would be unconscionable to allow the plaintiffs to claim LAD as they were responsible for the delay in the issuance of the certificate of fitness. The defendant also denied the plaintiffs had carried out the renovations with its knowledge and consent.

[14] It was further pleaded that the plaintiffs had committed criminal offences by contravening the provisions of the Uniform Building By-Laws 1984 and Street, Drainage and Building Act 1974 when they occupied and renovated the units prior to the issuance of the certificate of fitness. The defendant urged the court not to condone the conduct of the plaintiffs.

Issues To Be Tried

[15] The two issues for determination here are:

(i) whether the notice of delivery of vacant possession issued by the defendant is valid; and

(ii) whether the plaintiffs are entitled to the reliefs claimed on account of them having contravened the Uniform Building By-Laws 1984 and Street, Drainage and Building Act 1974.

Evidence Led At Trial

[16] There was no dispute on the facts except in relation whether the renovations were done with the knowledge and consent of the defendant.

[17] One of the witnesses called by the plaintiffs was PW13 Sulaiman bin Abi Hashim, the current director of building control in Majlis Perbandaran Sepang. He testified that in respect of the project here, vacant possession was to be delivered by way of certificate of fitness notwithstanding cl. 23 which alluded to a certificate of compliance and completion. He explained that this was because the said project was approved by the authorities before the certificate of compliance and completion had come into force. He did not think that the fact that the SPAs agreements were signed after the certificate of compliance and completion had come into force was relevant or made any difference.

[18] PW13 testified further, without challenge, that the delay in the issuance of the certificate of fitness for this project was due to two reasons. First, the defendant was able to secure the approval letter from Syabas only on 30 December 2013, and, secondly, on account of the unauthorised renovations carried out by the plaintiffs. He added that on 23 June 2014, his office issued the certificate of fitness in respect of the units purchased by first to third plaintiffs. The remaining units obtained their certificate of fitness on 15 January 2015.

Certificate Of Compliance And Completion

[19] It was common ground that on 12 April 2007, an amendment was made to the Housing Development (Control and Licensing) Act 1966 to replace the certificate of fitness with the certificate of compliance and completion. Both certificates in essence have the same purpose – to confirm that the properties have been safely constructed and fit for occupation. But, there is one main difference. It is the local authority that is responsible to sign off a certificate of fitness, whilst the responsibility to sign off a certificate of compliance and completion is on private bodies such as architects and engineers known as the principal submitting person.

[20] It is also common knowledge that confirmation and clearance from six essential services are a prerequisite to receive approval of a certificate of compliance and completion, namely:

(i) electricity supply;

(ii) water supply;

(iii) sewage connection;

(iv) clearance from lifts and machinery department;

(v) roads and drainage; and

(vi) clearance from Fire Service Department.

A **Was There Delay In The Delivery Of Vacant Possession**

[21] I turn now to consider the key issue in this case. Whether the notice of delivery of vacant possession issued by the defendant is valid.

[22] It bears mention that counsel for the defendant correctly conceded that
B if delivery of vacant possession in the instant case is by way of certificate of compliance and completion, it would necessarily mean that the notice of delivery of vacant possession issued by the defendant is invalid as the defendant is obliged to give the plaintiffs both possession and the right to occupy the units within 24 months.

C **[23]** However, it was his argument that PW13's evidence established that the project was governed by certificate of fitness, and as such the phrase certificate of compliance and completion in cl. 23 could not apply to this case. It was submitted that the phrase certificate of compliance and completion in cl. 23 thus ought to be read as certificate of fitness. The law
D pertaining to certificate of fitness applied to the instant case. As the plaintiffs were given possession of their units before the expiry of the 24 months, there was no breach of cl. 23 and the notice of delivery of vacant possession was valid.

[24] In my view, the defendant's submission does not merit the
E countenance of law. The object of housing developers legislation is to protect house buyers against the housing developers. The defendant is bound by the terms in the sale and purchase agreement. The SPAs were all signed after the change in legislation pertaining to the certificate of compliance and completion had come into force. I find nothing in this case to oust the
F application of the well-known rule that parties are bound by the terms in the agreement they sign in the absence of fraud and misrepresentation. The date of approval by the authorities of the Desa Camilla project has no relevance to whether it is the certificate of fitness or the certificate of compliance and completion that has application. It is the date of the SPAs, which were made
G after the coming into force of the amendment to the Housing Development (Control and Licensing) Act 1966, that is relevant. It would follow that that the defendant's submission that vacant possession for the project was by way of certificate of fitness is untenable.

[25] Additionally, if indeed there had been an error or mutual mistake in
H the drafting of cl. 23, the defendant ought to have sought for the rectification of the agreements under s. 30 of the Specific Relief Act 1950. Having failed to do so, the defendant is bound by the SPAs they have signed and cannot dispute the validity of cl. 23 by way of submission.

[26] In view of counsel's concession (para. [22] (*supra*)), it would follow
I that the notice of delivery of vacant possession is invalid. The defendant's obligation under cl. 23 was to deliver to the plaintiffs both possession and

the right to occupy the units within 24 months. I must therefore express my disagreement with the submission of the defendant that there was no delay in the delivery of vacant possession.

Estoppel

[27] That brings me to the next issue. Whether the plaintiffs ought to be estopped from pursuing their claim for LAD.

[28] The facts relevant to this issue are these. The plaintiffs moved in and occupied their units without waiting for the issuance of the certificate of fitness in breach of the Uniform Building By-Laws 1984. They also undertook renovations without obtaining the written consent of the defendant and the local authority in breach of cl. 14 of the SPAs and the Street, Drainage and Building Act 1974. This delayed the issuance of the certificate of fitness as the defendant had to amend the building plans to reflect the renovations undertaken in the units.

[29] It was the defendant's contention that the plaintiffs ought to be stopped from maintaining this action on two grounds. First, the plaintiffs were responsible for causing the delay in the issuance of the certificate of fitness. Secondly, the plaintiffs had committed criminal offences when they occupied and renovated the units in contravention of the Uniform Building By-Laws 1984 and Street, Drainage and Building Act 1974. In response, counsel for the plaintiffs did not dispute that the plaintiffs had occupied and renovated the units in breach of the law but sought to counter the defendant's argument by contending that this was inconsequential as the defendant's obligation under the SPAs was to give both possession and the right to occupy within 24 months.

[30] It would be useful if I set out the relevant provisions in the Uniform Building By-laws 1984 and Street, Drainage and Building Act 1974 before I consider the merits of the parties' respective submissions. Section 28 of the Uniform Building By-Laws 1984 reads:

> (1) No person shall occupy or permit to be occupied any building or any part thereof, other than a singly built detached house, unless a certificate of fitness for occupation, a partial certificate of fitness for occupation or a temporary certificate of fitness for occupation has been issued under these By-laws for such building and any failure to comply with this by-law shall render such person liable to prosecution under the Act.
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> (2) No person shall occupy or permit to be occupied any single built detached house unless a certificate of completion and compliance has been issued under these By-laws for the singly built detached house and any failure to comply with this paragraph shall render such person liable to prosecution under the Act.

[31] It is clear from the aforesaid provision that a purchaser who contravenes the above provision and occupies a house before the issuance of the certificate of fitness for occupation attracts penal consequences.

[32] And, s. 70 of the Street, Drainage and Building Act 1974 states:

> (11) Any person who makes any alteration to any building otherwise than is provided for in this Act or by-laws made there under or without the prior written permission of the local authority shall be liable on conviction to a fine not exceeding twenty-five thousand ringgit and a Magistrate's Court shall, on the application of the local authority, issue a mandatory order to alter the building in anyway or to demolish it.
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> ...
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> (13) Anyone person who:
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> ...
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> (b) deviates from any plan or specification approved by the local authority without the prior written permission of the local authority;
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> ...
>
> shall be liable on conviction to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction.
>
> (14) in any case where proceedings have not been instituted against any person who, by reason of failure to obtain prior permission from the local authority, has contravened subsection (13) such person shall, on the submission of plans and specifications to the local authority by the principal submitting person or submitting person in accordance with this Act, pay to the local authority a sum which shall be not less than five times but not exceeding twenty times the prescribed fees as the State Authority may prescribe, and in the event of plans and specifications being submitted without such payment, the local authority shall refuse to accept the same.
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> ...
>
> (16) For the purposes of this section and of section 75 a person shall be deemed to erect a building who:
>
> ...
>
> (f) departs either before or after the completion of the building in any particular form from any plan or specification approved by the local authority at any time in respect of such building;

[33] Likewise, a purchaser who carries out renovations without the prior written permission of the local authority also commits a criminal offence.

[34] It is a principle of law that no one can take advantage of the existence of a state of things which he himself produced. This principle is based on notions of fair play and commercial morality. It would be an affront to justice and public policy to allow a party in breach of its contractual obligations to

rely on its very breach to either evade its obligations or to assert that the other contracting party must accept the consequences of that breach. As a matter of public policy, the court should not appear to reward or condone a breach of the law.

[35] The application of this principle is succinctly illustrated by the case of *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489. There, the trial judge allowed the plaintiff's claim under the Land Acquisition Act 1960 for compensation in respect of a building constructed illegally on the plaintiff's land without planning permission. The defendant appealed. In allowing the appeal, Gopal Sri Ram JCA explained:

> Quite apart from the construction of para 1(3)(b) of the First Schedule, there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage of his own breach. See *Alghussein Establishment v. Eton College* [1988] 1 WLR 587 *New Zealand Shipping Co Ltd v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1.
>
> But as I have said, the principle is of universal application. In the context of the present case, that principle produces the following result. A land owner who has erected a building on his land contrary to law ought not to receive any benefit from it from an acquiring authority under the Act.

[36] So too here. The plaintiffs should not be allowed to take advantage of a condition which they themselves brought. They occupied and undertook renovations to their units in breach of the express prohibition of law. It must be borne in mind that liquidated damages is awarded to a purchaser to compensate him for losses he would suffer when he is forced to look for alternative accommodation consequent upon delay in the delivery of vacant possession. In the circumstance, I fail to see how the plaintiffs here can claim they have suffered losses.

[37] The principle that a party will not be allowed to take advantage of its own wrong operates here to prevent the plaintiffs from claiming LAD. I am satisfied that the conduct of the plaintiffs does create such estoppel.

Conclusion

[38] In the circumstances, and for the reasons given above, the plaintiffs' claim is dismissed with costs of RM50,000.